Supreme Court, U. S.
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No. 78-1262

In the Supreme Court of the United States

OCTOBER TERM, 1978

KEVIN FLOWERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the admissions that he made to federal agents should have been suppressed because they were obtained in violation of his right to counsel.

After a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of possession of an unregistered sawed-off shotgun in violation of 26 U.S.C. 5845, 5861(d), and 5871. He was sentenced to two years' imprisonment, but execution of the sentence was suspended, and he was placed on probation for five years.

1. The evidence established that on February 8, 1978, petitioner was arrested by New York City police officers for possession of a sawed-off shotgun and five live shotgun shells (Tr. 59-60, 176-178). On February 17, 1978, the state charges against petitioner were dismissed during a proceeding at which petitioner was present. At the

conclusion of the state proceedings, two agents of the Alcohol, Tobacco and Firearms Bureau who were present at the courthouse executed a federal warrant for petitioner's arrest (Tr. 14, 50; S. Tr. 19, 36-37).[1] One of the agents told the attorney who was representing petitioner in the state case that the agents had a federal warrant to arrest his client (Tr. 37-38, 53-54; S. Tr. 32, 43-45). The attorney asked for a copy of the warrant and left to speak with petitioner (Tr. 37-38). When he returned, the attorney informed the agents that he did not practice in the federal courts and that he would not be representing petitioner in the federal case (Tr. 38, 54; S. Tr. 44-45).[2] One of the agents asked the attorney whether they could speak to petitioner, and the attorney replied that he saw no problem with their doing so, that he was not representing petitioner on the federal charges, and that it was up to the petitioner to decide whether he was willing to talk to them (Tr. 38). The agents then arrested petitioner and advised him of his rights, including his right to counsel (Tr. 16, 51; S. Tr. 20, 37). Petitioner stated that he understood his rights (Tr. 17, 51; S. Tr. 20, 37). While the agents were driving petitioner across town, petitioner admitted to the agents that he had purchased the shotgun three years earlier for $55 (Tr. 22-23, 52; S. Tr. 23-24, 38). Later, petitioner read and signed a written waiver of his rights and then repeated the admission he had made to the agents in the car (Tr. 28-30; S. Tr. 26-28).

The district court reserved ruling on petitioner's motion to suppress these admissions until the completion of the trial testimony (Tr. 5). At the end of the relevant

[1]"S. Tr." refers to the transcript of the evidentiary hearing held on petitioner's motion to suppress the admissions.

[2]The agents' testimony on this point was corroborated by petitioner's mother, who testified (Tr. 82) that her son's attorney told her that the case "has been turned over to the federal * * * government" and that she would need to get a "federal lawyer."

testimony, the district judge found as a matter of fact that petitioner was not represented by counsel on the federal charge at the time of his admissions (Tr. 71). The court of appeals affirmed this finding (Pet. App. 2a).

2. The record does not support petitioner's allegation (Pet. 4) that his incriminating admissions were made during questioning "in the enforced absence of his lawyer." The record clearly shows that petitioner was not represented by counsel on the federal charge at the time the admissions were made. The attorney who had represented petitioner on the state charges stated unequivocally that he was not representing petitioner on the federal charges. Moreover, he raised no objection to the agents' questioning of petitioner outside his presence. Petitioner then made the admissions after he had been informed of his *Miranda* rights and had knowingly waived his right to have counsel present. Petitioner's reliance on *Massiah* v. *United States*, 377 U.S. 201 (1964), is thus misplaced. *Massiah*, and the more recent decision in *Brewer* v. *Williams*, 430 U.S. 387 (1977), involve situations where government agents deliberately elicited incriminating statements from a defendant who was represented by counsel without securing a waiver of the defendant's right to have his counsel present, and without informing counsel.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[3]Moreover, we note that since petitioner had been arrested, but not yet indicted, the right to counsel had not yet attached. See *Kirby* v. *Illinois*, 406 U.S. 682 (1972).

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